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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

UNITED STATES ex rel SAM DeSTEFANO,

Petitioner,

vs.

JOSEPH I. WOODS, Sheriff of Cook County, Illinois,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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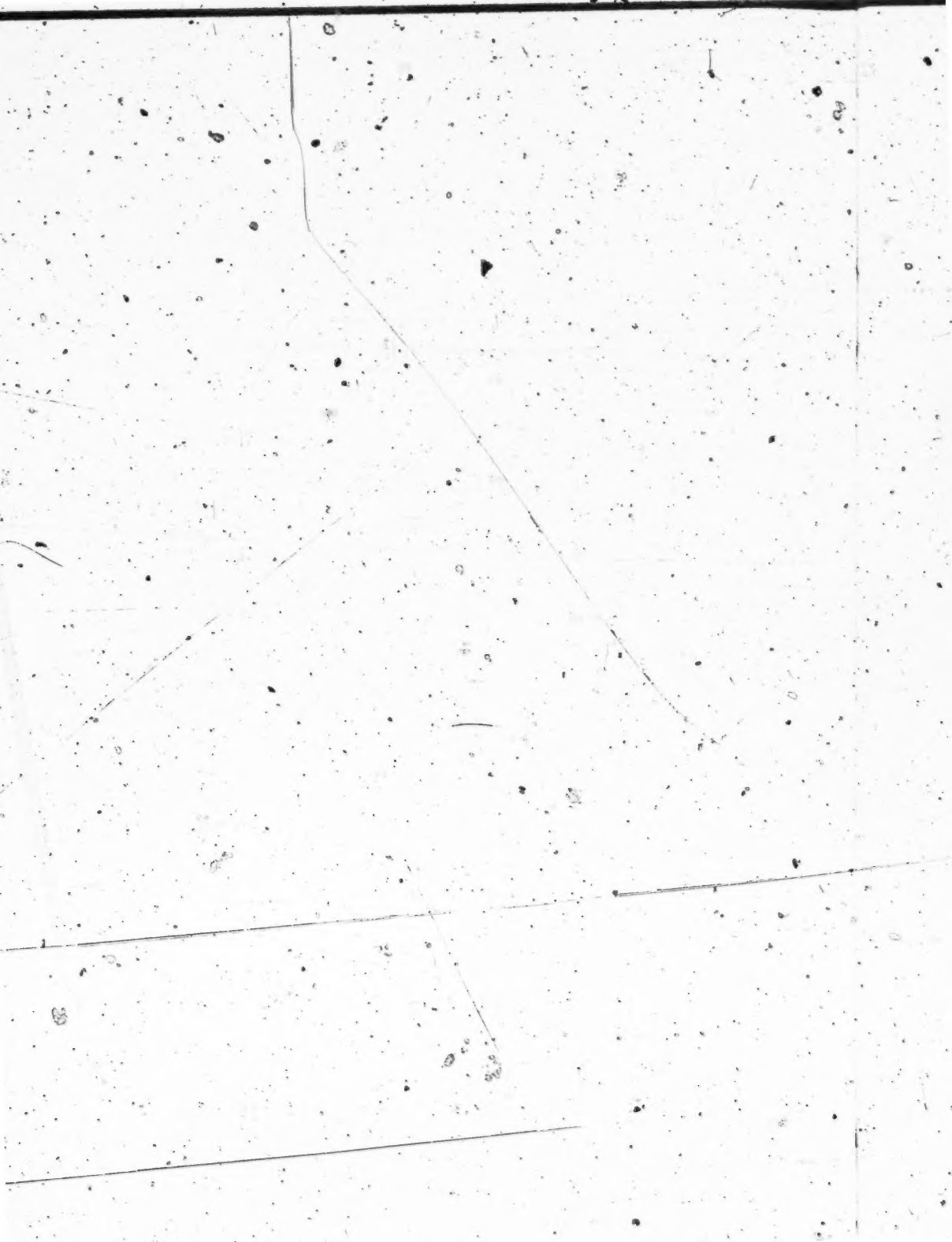

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IN THE

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No.

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vs.

JOSEPH I. WOODS, Sheriff of Cook County, Illinois,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner, SAM DESTEFANO, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit in the case entitled United States of America *ex rel.* Sam DeStefano, Petitioner-Appellant vs. Joseph I. Woods, Sheriff of Cook County, Illinois, Respondent-Appellee, No. 16070.

OPINIÓN AND ORDERS OF THE COURT BELOW

The decision of the United States District Court for the Northern District of Illinois, Eastern Division was entered on January 31, 1967. It is not reported but appears in the printed appendix filed, and certified by the Clerk of the United States Court of Appeals for the Seventh Circuit as a part of the record and transmitted herewith.

The oral opinion rendered by the District Court is also incorporated in the printed appendix filed, and certified as above stated. The opinion of the United States Court of Appeals for the Seventh Circuit, affirming such judgment, was filed on July 6, 1967, and is not yet reported, but is set forth in the petitioner's appendix hereto (*infra*, pages App. 1-6)*, and in the certified copy of the record.

Petition for Rehearing was denied on August 3, 1967. No opinion was rendered on the Petition for Rehearing, and the Order Denying such Petition is not reported, but is set forth in the appendix hereto (*infra*, page App. 8) and in the certified copy of the record.

STATEMENT OF JURISDICTION

The Order of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division was filed on July 6, 1967. On August 3, 1967, it was ordered that the Petition for Rehearing be denied (these orders appear in Petitioner's Appendix hereto, *infra*, pages App. 7-8). This Petition is filed within 90 days of the denial of the Petition for Rehearing in the United States Court of Appeals for the Seventh Circuit.

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* "App." refers to supplemental appendix *infra*. "A." refers to appendix filed in the Court of Appeals.

The jurisdiction of this court is invoked under 28 U.S.C., §1254(1).

QUESTIONS PRESENTED

1. Does petitioner have a constitutional right to jury trial on an Illinois criminal contempt charge resulting in three concurrent one-year sentences?

2. Does a sentence for direct criminal contempt in excess of six months imprisonment, without restriction on the trial judge as to the extent of punishment necessary or proper to the vindication of his dignity, violate the Eighth Amendment to the Constitution of the United States?

STATEMENT OF THE CASE

This cause commenced by the filing of a Petition for a Writ of Habeas Corpus on January 18, 1967, which Petition was Amended the following day. (A. 3-8) On January 23, 1967, the respondent moved to dismiss the Petition for a Writ of Habeas Corpus, as Amended, which Motion was denied on January 31, 1967. On the same January 31, 1967, the Respondent filed his Answer to the Petition for the Writ of Habeas Corpus (A. 2, 9-13).

At that time, Petitioner was in the custody of the Respondent on the Contempt convictions pursuant to a final order issued out of the Appellate Court of Illinois, First District. From the decision of the Illinois Appellate Court, 64 Ill. App. 2d 368, 212 N.E. 2d 368, the Petitioner filed a Petition for Leave to Appeal to the Illinois Supreme Court, which Petition was denied on March 22, 1966, without opinion. A Petition for Writ of Certiorari was filed in this Court within the time allowed by law and on December 12, 1966, said Writ was denied. *DeStefano* v. *Illinois*, 87 S.Ct. 594 (The Chief Justice, Mr. Justice Black and Mr. Justice Douglas were of the opinion that Certiorari should

have been granted. An application for a Writ of Habeas Corpus was made to the United States District Court for the Northern District of Illinois on December 15, 1965, which Petition was dismissed for failure to exhaust State remedies on December 28, 1965. Subsequently, on January 3, 1967, an opportunity was afforded the Supreme Court of Illinois to rule on the constitutional questions herein involved via a Petition for Leave to File an Original Petition for a Writ of Habeas Corpus, which was denied on January 11, 1967.

The Petitioner's incarceration resulted from findings of guilty of being in contempt of court, during the course of a criminal trial in which he was defending himself in the Circuit Court of Cook County—Criminal Division. On December 9, 1964, he was sentenced to one year in the Cook County Jail on each of three contempts, the sentences to be served concurrently, and additionally fined $2,000.00. When he was judged guilty of contempt, the trial court refused him bail on appeal. He served 87 days of the contempt sentence until he was ordered released on bail in the amount of $5,000.00 on order of Mr. Justice Tom Clark of this court. Thereafter he remained on bail during the appeal processes of the Illinois Courts and in this court.

Upon the Petitioner's receiving notification from his attorney of the denial of Certiorari to review the State conviction, he surrendered to the State authorities as a condition of his bond required, and served an additional 207 days until, on his application for bail pending appeal, Mr. Justice Tom Clark granted him bail pending appeal in this cause. He has thus served approximately seven months of the concurrent sentences imposed.

Prior to the imposition of the said three one-year concurrent sentences and the $2,000.00 fine, the petitioner was neither indicted, nor was he accorded jury trial, nor did he waive jury trial.

In the petition for the Writ of Habeas Corpus (A. 3-8), this Petitioner contended his incarceration and detention to be violative of the Constitution of the United States in that the summary disposition of the contempt charges resulting in three concurrent one-year sentences and a substantial fine, without indictment, is violative of the Fifth Amendment to the Constitution of the United States, requiring indictment or presentment by a Grand Jury, and, beyond the jurisdiction of the trial court in that the Petitioner's right to a jury trial insured by the Sixth Amendment to the Constitution of the United States was not complied with. It was his further contention that jury trial was a necessity where sentences for criminal contempt exceeded those allowed in convictions of petty offenses, citing this Court's decision in *Cheff* v. *Schnackenberg,* 384 U.S. 337. It was the position of the respondent that the complaints of the petitioner did not reach constitutional proportions and that this court in *Cheff* v. *Schnackenberg* intended only to exercise its supervisory power over federal courts, 384 U.S. 373 at 380. In its oral findings the trial court determined: "That the question of this right to a jury trial based on the *Cheff* case is not a constitutional right." (A. 13)

In affirming, the United States Court of Appeals for the Seventh Circuit held:

> "As we interpret *Cheff*, the court was there announcing a rule of procedure for federal courts. It was not considering any state court proceeding. Obviously the state court proceeding here involved is subject to the control of the state of Illinois and not to the federal

court as to the procedure pursued in punishing for criminal contempts such as here involved." (App. 4)

It was a further contention of the petitioner that the three concurrent sentences of one year in the County Jail and the substantial fine is excessive as to a matter of constitutional law and violative of the Eighth Amendment proscription against cruel and unusual punishment. The respondent contended that either a fine or imprisonment or both, are proper punishment in a contempt case under Illinois law, that the punishment actually levied was solely in the trial court's sound discretion and should not be overturned except in cases of gross abuse, and that the action of the petitioner clearly embarrassed the court, and disrupted and defeated the prompt and fair administration of justice, relying on the Appellate Court decision in *People* v. *DeStefano,* 64 Ill. App. 2d 368 at 383. The District Court below found that the punishment imposed was not a violation of the constitutional right against cruel and unusual penalties. (A. 13)

The Court of Appeals for the Seventh Circuit held:

"2. Furthermore, the record shows that, as a result of petitioner's repeated acts of misconduct in open court in utter disregard of the proper administration of the court's business, the court imposed three one-year sentences, but with indulgence provided that they should be served concurrently, although it in addition imposed a fine of $2,000 as to one of the charges of contempt. These facts contradict petitioner's charge that cruel and unusual punishment was imposed upon him in violation of the eighth amendment to the constitution of the United States. In fact any less punishment would be an invitation to other such persons to vie with petitioner in more flagrant ways of showing their contempt for courts of law." (App. 4-5)

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

I.

THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT HAS MISINTERPRETED THIS COURT'S DECISION IN CHEFF v. SCHNACKENBERG, 384 U.S. 373, AND ITS DECISION IN THIS CAUSE CONFLICTS WITH THAT DECISION AND WITH THE DECISION OF THE SECOND CIRCUIT IN UNITED STATES v. FERRARA, 377 F.2d 16.

In determining that this court merely announced a rule of procedure for federal courts by its decision in *Cheff* v. *Schnackenberg,* 384 U.S. 373, we submit that the Seventh Circuit has misinterpreted the true portent of that case. This court, after concluding that the sentence in Cheff of six months qualified as a "petty offense" under Title 18, U.S.C. §1, and that petty offenses historically have not entitled an accused to trial by jury, it condoned the sentence of six months imposed upon Cheff, which concurs with the outmost limits of punishment for "petty offenses" in the defining statute, (18 U.S.C. §1) and determined the sentence was prohibited neither by the Sixth Amendment to the Constitution of the United States nor Article III, Section 2, Clause 3. The court then recognized that the opinion authorizing the imprisonment of Cheff left no guide lines to act as a standard in cases involving a larger penalty, and further recognized that there was no controversy presently pending before the court to give occasion for a clear ruling in the events of lengthier penalties. It, therefore, invoked its general supervisory pow-

er over *federal* courts to assist them in pending and future cases, saying:

> "At the same time, we recognize that by limiting our opinion to those cases where a sentence not exceeding six months is imposed we leave the federal courts at sea in instances involving greater sentences. Effective administration compels us to express a view on that point. Therefore, in the exercise of the Court's supervisory power and under the peculiar power of the federal courts to revise sentences in contempt cases, we rule further that sentences exceeding six months for criminal contempt may not be imposed by federal courts unless a jury trial has been received or waived. Nothing we have said, however, restricts the power of a reviewing court, in appropriate circumstances, to revise sentences in contempt cases tried with or without juries." *Cheff* v. *Schnackenberg,* 384 U.S. 337.

But, this exercise of supervisory power as to pending and future cases in no way detracts from the constitutional issues involved in this case. This Court did not consider the questions raised in *Cheff* as regulatory nor rule making. The approach to the *Cheff* case was definitely on constitutional terms. This Court explicitly stated that it granted Cheff's Petition for Certiorari "limited to a review of the question whether, after a denial of a demand for a jury, a sentence of imprisonment of six months is constitutionally permissible under Article 3 and the Sixth Amendment." To assume the reasoning of the court below, we would have to conclude that this Court, recognizing only a constitutional question, did not resolve it on a constitutional basis.

While this Court resolved the issue in *Cheff* by denominating his six month sentence satisfactorily suits the outmost limits of petty offenses, it also clearly implied

and agreed that sentences imposed in excess of six months were constitutionally required to provide for jury trial. In summarizing Cheff's argument, the court said that he, Cheff, "would have us hold that the right to trial by jury attaches in all criminal contempts and not merely those which are outside the category of 'petty offenses'."

Thus, the main opinion in *Cheff* takes for granted that trial by jury is insured under the Constitution when the sentence exceeds the six month limitation.

The interpretation put on *Cheff* by the court below, ignores the entire tenor of this court's decision. *Cheff* revolves principally about the decision in *District of Columbia* v. *Clawans,* 300 U.S. 617, and clearly approached the question of summary punishment as a constitutional one. Illustratively, the dissent of Justices Black and Douglas adverted to and interpreted the *District of Columbia* v. *Clawans* decision as reflecting a principle that no offense which carries a substantial penalty can be "petty". In the main opinion, the court accepted a statement from the dissent in *United States* v. *Barnett,* 376 U.S. 681 at 751 that:

> "At the time of the constitution all types of 'petty' offenses punishable by trivial penalties were generally triable without a jury. This history justifies the imposition without trial by jury of no more than trivial penalties for criminal contempts."

The decision in *District of Columbia* v. *Clawans,* so heavily relied on in *Cheff,* makes it clear that the summary imposition of sentences raises a constitutional question.

> "It is settled by the decisions of this Court, which need not now be discussed in detail, that the right of trial by jury, thus secured, does not extend to every

criminal proceeding. At the time of the adoption of the Constitution there were numerous offenses, commonly described as 'petty,' which were tried summarily without a jury, by justices of the peace in England, and by police magistrates or corresponding judicial officers in the Colonies, and punished by commitment to jail, a workhouse, or a house of correction. We think, as the Court of Appeals held and respondent concedes, that apart from the prescribed penalty, the offense of which petitioner was convicted is, by its nature, of this class, and that were it not for the severity of the punishment, the offender could not, under our decisions, claim a trial by jury as of right.

* * * *

"But this Court has refused to foreclose consideration of the severity of the penalty as an element to be considered in determining whether a statutory offense, in other respects trivial and not a crime at common law, must be deemed so serious as to be comparable with common law crimes, and thus to entitle the accused to the benefit of a jury trial prescribed by the Constitution. See *Schick* v. *United States, supra* (195 U.S. 67, 68, 49 L. ed. 101, 102, 24 S. Ct. 826, 1 Ann. Cas. 585)." *District of Columbia* v. *Clawans*, 300 U.S. 617, 624-5.

We, therefore, submit that this court's decision in *Cheff* v. *Schnackenberg* was clearly the resolution of a constitutional issue and that the incarceration of this petitioner for a period in excess of the outmost limits of those that can be imposed for petty offenses offends against the Sixth Amendment to the Constitution of the United States, made applicable to states under the due process clause of the Fourth Amendment, and offends against Article 3, Section 2, Clause 3 thereof.

We also respectfully direct the court's attention to the recent decision of the Second Circuit in *United States* v. *Ferrara*, 377 F. 2d 16. That court held:

> "On the other hand, we hold that appellant is correct in his contention that his one year sentence for criminal contempt should be reduced. In Cheff v. Schnackenberg, 384 U.S. 373, 380, 86 S.Ct. 1523, 1526, 16 L.Ed. 2d 629 (1966) the Supreme Court ruled that 'sentences exceeding six months for criminal contempt may not be imposed by federal courts absent a jury trial or waiver thereof.' Defendant did not, as the government argues, waive his right to a jury trial by pleading guilty to the contempt charge, since at the time of his plea Cheff v. Schnackenberg, the case which established his right, had not yet been decided. Indeed, the record discloses that before Ferrara pleaded guilty counsel informed him that he had a 'right to have a hearing without a jury to determine whether he was in criminal contempt.' His guilty plea cannot be regarded as an intentional relinquishment of a known right. See, e. g., Johnson v. Zerbst, 304 U.S. 458, 461, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)." *United States* v. *Ferrara*, 2 Cir., 377 F.2d 16, 18.

Thus, the Court of Appeals for the Second Circuit, resolved the question, not on the bases of procedural rules, but on the bases of *rights* established, and the rights of which that court spoke, as did this court in *Cheff*, were rights of constitutional dimension.

We therefore submit that the Seventh Circuit has decided this basic constitutional question in a way in conflict with *Cheff* and with the Second Circuit, and contrary to the mandate of the Constitution of the United States.

It seems to be established that a person in a contempt proceeding against him is entitled as a constitutional right to be represented by counsel (*In Re Germann*, S.D.N.Y.,

262 F. Supp. 707, 709). There seems to be no reason why if an accused is entitled to one constitutional right, other constitutional rights of persons accused should be denied him, since we know of no hierarchy of constitutional rights, nor any distinction in their application. Therefore, we submit in accordance with that authority, that petitioner's other rights under the Fifth and Sixth Amendments, incorporated into the due process clause of the Fourteenth Amendment, were wrongly denied him.

This court's attention is further directed to the decision in *People* v. *Bloom*, 35 Ill. 2d 255, which, while it is not expressly relied upon by the Seventh Circuit, nonetheless was a major basis relied on by the respondent herein in resisting the Petition for the Writ of Habeas Corpus.

At the session of this court of April 17, 1967, review on certiorari was granted in that case (87 S. Ct. 1346). One of the two questions to be considered by this court in that grant of certiorari is:

> "(1) Does defendant have fourteenth amendment right to jury trial on Illinois criminal contempt charge resulting in two year prison sentence?" *Bloom* v. *Illinois*, cert. grt. 87 S.Ct. 1346.

The question presented here is indistinguishable:

> "(1) Does petitioner have a constitutional right to jury trial on an Illinois contempt charge resulting in three concurrent one year sentences?" (*Supra*, p. 3)

It is submitted that the same question is presented to this court in this petition as this court agreed to review in *Bloom*, and respectfully suggest this question be considered by this Court together with *Bloom*.

II.

A LAW WHICH PERMITS IMPRISONMENT REGULATED ONLY BY THE SENSIBILITIES AND PREJUDICES OF THE VICTIM OFFENDS AGAINST THE EIGHTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AS CRUEL AND UNUSUAL AND IS IN CONFLICT WITH THE DECISIONS OF THIS COURT IN WEEMS v. UNITED STATES, 217 U.S. 349 AND IN DISTRICT OF COLUMBIA v. CLAWANS, 300 U.S. 617.

In a case such as the one at bar, the victim, the prosecutor, the jury and the judge are all embodied in one person. The measure of punishment is governed by the sensitivity, subjectivity, and in large part, egotism of the victim-prosecutor-jury-judge.

The sentences imposed here serve only to emphasize that objective approach, in a country nominally of laws and not of men, is effectively defeated in this type of procedure.

Ordinarily, the legislature determines the scope of permissible punishment for offenses. This is one of the main constitutional infirmities in excessive punishment in contempt citations. The victim-prosecutor-jury-judge exercises an unbridled authority to mete out punishment, which punishment depends upon nothing more than his own personality. There is no prohibition against his imposing life imprisonment, or, so far as we know, capital punishment.

Though we contend that a sentence such as that imposed in this case following mere, at most, disruption of a court room, is not suited to the gravity of the offense, the United States Court of Appeals for the Seventh Circuit disagreed (App. 4-5) but, we submit, that is the unim-

portant aspect. The want of objective standards of punishment is alien to our form of government.

> "But we may doubt whether summary trial with punishment of more than six months'-imprisonment, prescribed by some pre-Revolutionary statutes, is admissible, without concluding that a penalty of ninety days is too much. Doubt must be resolved, not subjectively by recourse of the judge to his own sympathy and emotions, but by objective standards such as may be observed in the laws and practices of the community taken as a gauge of the its social and ethical judgments." *District of Columbia* v. *Clawans*, 300 U.S. 617, 627-8.

Thus, the practice approved in the Court below of inflicting punishment, without regulation by a detached and impersonal authority, offends against the Constitutional safeguards designed to insure equality.

Further, the permissible punishment, under the present practice knows no bounds, and is, therefore, cruel within the meaning of the eighth amendment in that it is devoid of permissible limit. It is unusual in that it is not apportioned to the offense, may be inflicted without standard, and is imposed by the person offended, who would ordinarily be disqualified from adjudicating any other offense.

In *Weems* v. *United States*, 217 U.S. 349, permissible punishment, not appropriate to the offense involved, was cast down. This court held that:

> "even if the minimum penalty of *cadena temporal* had been imposed, it would have been repugnant to the Bill of Rights. In other words, the fault is in the law; . . . " (217 U.S. at 382)

CONCLUSION

Wherefore, for the foregoing reasons, Petitioners pray that a Writ of Certiorari be issued to the United States Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

ANNA R. LAVIN
Attorney for Petitioner

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 16070 SEPTEMBER TERM, 1966 APRIL SESSION, 1967

UNITED STATES OF AMERICA,
ex rel. SAM DE STEFANO,
Petitioner-Appellant,
vs.
JOSEPH I. WOODS, Sheriff
of Cook County, Illinois,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

July 6, 1967

Before SCHNACKENBERG, KILEY and SWYGERT, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Sam De Stefano, petitioner, appeals from an order of the district court entered January 31, 1967, dismissing his petition for a writ of habeas corpus, as amended, against Joseph I. Woods, Sheriff of Cook County, Illinois, respondent. The case was disposed of by the court on the pleadings.

Petitioner was placed in the custody of respondent pursuant to a final order of the Appellate Court of Illinois, First District, *People* v. *De Stefano,* 64 Ill. App. 2d 368 (1965), cert. denied 385 U.S. 989. In three orders defend-

ant had been found guilty of direct criminal contempts of court under the laws of Illinois for his conduct in open court during the trial of a criminal case against him,[1] in the Criminal Division of the Circuit Court of Cook County, Illinois.

As revealed by the opinion of the Appellate Court, the conduct of defendant was appraised by that court, at 387-88:

> "We find the instant contempt orders recite flagrant misconduct, disrespect and open defiance of the court's authority, continued in the face of repeated warnings and findings of contempt during the trial. These contempts clearly embarrassed the court, disrupted and defeated the prompt and fair administration of justice. No court should permit such gross, deliberate and blatant disrespect for the court to go unpunished, whether by a lawyer or by a layman acting pro se in his own defense. Our courts could not long endure under such circumstances. * * * "

For his acts of contempt of court, defendant was sentenced to three concurrent one-year sentences in the county jail and, in addition, to one of the sentences a $2,000 fine was added. This punishment was imposed at the close of the jury trial.

1. In this court petitioner's counsel attacks on federal constitutional grounds the sentences imposed for contempt.

The attack upon these sentences is based upon the contention that their imposition violated the federal constitution, citing article III § 2, that "The Trial of all Crimes

[1] The trial resulted in De Stefano, being found guilty by jury verdict of "illegally offering to vote in manner and form as charged in the indictment" and he was sentenced to the penitentiary for a term of 1 to 3 years.

* * * shall be by Jury; * * * ", as well as the sixth amendment to the constitution. Reliance is also placed on *Cheff* v. *Schnackenberg,* 384 U.S. 373 (1966).

Respondent's counsel point out, however, that nothing said in *Cheff* indicates an intent to repudiate *Green* v. *United States,* 356 U.S. 165 (1958). In *Green,* at 183, the court considered petitioner's constitutional arguments in that case, saying:

> " * * * The claim is that proceedings for criminal contempts, if contempts are subject to prison terms of more than one year, must be based on grand jury indictments under the clause of the Fifth Amendment providing: 'No person shall be held to answer for a capital, or otherwise *infamous crime,* unless on a presentment or indictment of a Grand Jury. . . . ' (Italics added.) Since an 'infamous crime' within the meaning of the Amendment is one punishable by imprisonment in a penitentiary, *Mackin* v. *United States,* 117 U.S. 348, and since imprisonment in a penitentiary can be imposed only if a crime is subject to imprisonment exceeding one year, 18 U.S.C. § 4083, petitioners assert that criminal contempts if subject to such punishment are infamous crimes under the Amendment.
>
> "But this assertion cannot be considered in isolation from the general status of contempts under the Constitution, whether subject to 'infamous' punishment or not. The statements of this Court in a long and unbroken line of decisions involving contempts ranging from misbehavior in court to disobedience of court orders establish beyond peradventure that *criminal contempts are not subject to jury trial as a matter of constitutional right.* * * * [Italics supplied]."

Green was expressly followed in *United States* v. *Barnett*, 376 U.S. 681 (1964), where, at 692, the court said:

> "Finally, it is urged that those charged with criminal contempt have a constitutional right to a jury trial. This claim has been made and rejected here again and again. Only six years ago we held a full review of the issue in *Green* v. *United States*, * * * It has always been the law of the land, *both state and federal, that the courts*—except where specifically precluded by statute—have the power to proceed summarily in contempt matters. * * * [Italics supplied]."

While we believe that the United States Supreme Court has made it clear that the federal constitution does not require a jury trial in a criminal contempt case, which is what is involved in the case at bar, counsel for petitioner here contends that *Cheff* has insured the right to a trial by jury under the federal constitution, even in a state court, when the sentence exceeds six months. We disagree. As we interpret *Cheff*, the court was there announcing a rule of procedure for federal courts. It was not considering any state court proceeding. Obviously the state court proceeding here involved is subject to the control of the state of Illinois and not to the federal court as to the procedure pursued in punishing for criminal contempts such as here involved.

2. Furthermore, the record shows that, as a result of petitioner's repeated acts of misconduct in open court in utter disregard of the proper administration of the court's business, the court imposed three one-year sentences, but with indulgence provided that they should be served concurrently, altho it in addition imposed a fine of $2,000 as to one of the charges of contempt. These facts contradict petitioner's charge that cruel and unusual punishment was imposed upon him in violation of the eighth amendment

to the constitution of the United States. In fact any less punishment would be an invitation to other such persons to vie with petitioner in more flagrant ways of showing their contempt for courts of law.

3. Petitioner's counsel in this court urges as a ground for reversal that the record of the trial in the state court reflects such erratic behavior by petitioner during the trial that the trial court should have ordered a sanity hearing.

In the case at bar, the district court found "that there was not sufficiently called to the attention of the trial judge anything that would warrant a sanity hearing." We agree. In fact, we highly regard the opportunity of the trial judge to arrive at a correct appraisal of defendant, as he observed his conduct in court.

This record is quite different from that in *Pate* v. *Robinson*, 383 U.S. 375 (1966), where the evidence raised a sufficient doubt as to Robinson's competence to stand trial and, although the matter was called to the attention of the trial court by court-appointed counsel, defendant was convicted in an unduly hurried trial without a fair opportunity to obtain expert psychiatric testimony and without sufficient development of the facts on the issue of defendant's sanity when he committed the crime as well as his competence at the time of the trial.

In the case at bar the contemptuous conduct of petitioner as revealed by the record lacked any aspects of incompetence. Thus nothing was required of either the presiding judge or anyone acting on behalf of petitioner to initiate a sanity hearing.

For these reasons, the order from which this appeal was taken is affirmed.

ORDER AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Thursday, July 6, 1967

Before

HON. ELMER J. SCHNACKENBERG, *Circuit Judge*
HON. ROGER J. KILEY, *Circuit Judge*
HON. LUTHER M. SWYGERT, *Circuit Judge*

UNITED STATES OF AMERICA, EX REL. SAM DESTEFANO,
Petitioner-Appellant,
No. 16070 vs.
JOSEPH I. WOODS, Sheriff of Cook County, Illinois,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by the court that the order of the said District Court in this cause appealed from be, and the same is hereby, *affirmed,* in accordance with the opinion of this Court filed this day.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Thursday, August 3, 1967

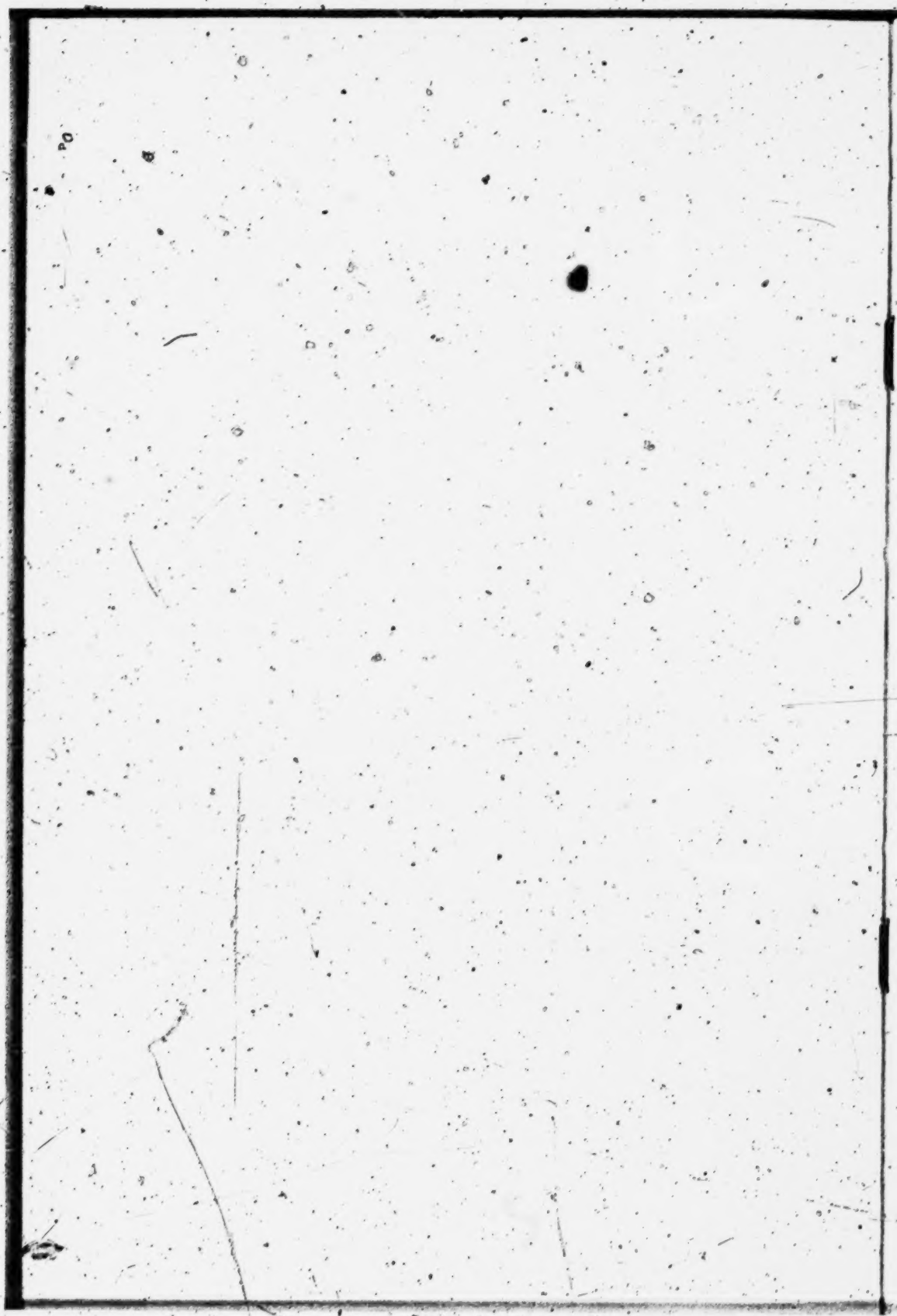
Before

HON. ELMER J. SCHNACKENBERG, *Circuit Judge*
HON. ROGER J. KILEY, *Circuit Judge*
HON. LUTHER M. SWYGERT, *Circuit Judge*

UNITED STATES OF AMERICA, EX REL. SAM DESTEFANO,
Petitioner-Appellant,
No. 16070 vs.
JOSEPH I. WOODS, Sheriff of Cook County, Illinois,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS ORDERED by the Court that the petition for a rehearing filed by petitioner-appellant in the above-entitled cause be, and the same is hereby, *denied.*



SUPREME COURT, U. S.

SEP 30 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 559

UNITED STATES EX REL., SAM DE STEFANO,
Petitioner,

vs.

JOSEPH I. WOODS, SHERIFF OF COOK COUNTY, ILLINOIS,
Respondent.

RESPONDENT'S OBJECTIONS TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES.

JOHN J. STAMOS,
State's Attorney of Cook County, Illinois,
2600 South California Avenue,
Chicago, Illinois 60608,
Attorney for Respondent.

ELMER C. KISSANE,
THOMAS A. HETT,
Assistant State's Attorneys,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. .....

UNITED STATES EX REL., SAM DE STEFANO,
Petitioner,

vs.

OSEPH I. WOODS, SHERIFF OF COOK COUNTY, ILLINOIS,
Respondent.

ESPONDENT'S OBJECTIONS TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES.

---

o the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent respectfully urges that this Honorable ourt, in its wise discretion, deny the Petition for Writ Certiorari heretofore filed by the Petitioner, Sam De efano, wherein the judgment of the United States Court Appeals for the Seventh Circuit in *United States of merica ex rel. Sam De Stefano* v. *Joseph I. Woods, eriff of Cook County, Illinois,* No. 16070, is sought to reviewed.

REASONS RELIED ON FOR DENIAL OF THE WRIT.

I.

The Right to a Trial by Jury Does Not Attach to Direct Criminal Contempt Cases.

This Court has consistently held, in several recent discussions of the problem, that the right to trial by jury does not attach, as a matter of constitutional right, to contempt proceedings.

In *Shillitani* v. *United States,* 384 U. S. 364, this Court reaffirmed the long-standing rule that subjects of civil contempt proceedings (such proceedings being remedial in character) are not clothed with a constitutional right to trial by Jury.

In both *Green* v. *United States,* 356 U. S. 165, and *United States* v. *Barnett,* 376 U. S. 681, 692, this Court held that criminal contempt proceedings do not, as a matter of constitutional necessity, call into play the jury trial provisions of either Article III, § 2 of or the Sixth Amendment to the Constitution of the United States.

Finally, in *Cheff* v. *Schackenberg,* 384 U. S. 373, this holding, as applied to criminal contempt proceedings was reaffirmed.

The petitioner's contention that the Court in *Cheff* decided, on constitutional grounds, the issue of the right to trial by jury as a result, not of the gravity of the offense, but rather, gauged by the severity of possible sentence, is patently unfounded and unsupportable by the Court's very language in *Cheff*. The supervisory power of the Supreme Court over lower Federal Courts was employed rather than a rule based upon Constitutional requirements. (See, *Cheff* v. *Schackenberg,* 384 U. S. 373, 380.)

Relying on this very recent analysis of the question by this Court no reason can be seen to require issuance of the requested Writ of Certiorari.

Moreover, as here involved, a summary hearing requiring no evidence to be presented to a fact finder—the contempts being committed directly in the presence of the committing magistrate during the course of a jury trial where this petitioner was a defendant—would make the entire question a moot point.

Only a legal question was involved in the instant contempt proceeding. No question of fact could be presented to a jury for their consideration. Hence, when a criminal contempt is direct in nature, the right to trial by jury does not constitutionally nor practically arise.

The practical consideration discussed above, distinguishes this cause from the case now pending in this Court, *S. Edward Bloom* v. *The People of the State of Illinois,* October Term, 1966, No. 52. There the criminal contempt is indirect in nature, requiring an evidentiary hearing, but even in that circumstance, the right to trial by jury does not attach. (See, Brief for Respondent, Point I, *S. Edward Bloom* v. *People of the State of Illinois,* October Term, 1966, No. 52.)

For the above-stated reasons, as to the first question presented by Petitioner herein, this Court must refuse to issue the requested Writ of Certiorari.

II.

The Punishment Here Imposed — Three Concurrent One Year Sentences for Three Acts of Direct Criminal Contempt — Is Not Cruel and Unusual Punishment Prohibited by the Eighth Amendment to the Constitution of the United States.

As clearly announced in *Weems* v. *United States,* 217 U. S. 349, the question involved in Eighth Amendment problems, is not the utmost limit of possible penalty, but what in fact has been the penalty imposed.

There need be no extensive citation of examples of more extreme penalties than the one-year here imposed. In this case, the punishment certainly was lenient, *United States, ex. rel. De Stefano* v. *Woods,* CA 7th, 1967, No. 16070, July 6, 1967 (Appendix to Petition, App. 4-5); *People* v. *De Stefano,* 64 Ill. App. 2d 368 (1965), cert. denied 385 U. S. 989.

Alluding to petitioner's citation to *Weems* v. *United States,* 217 U. S. 349, found at page 14 of his Petition, such appears to be a classic example of oversight. The issue there was whether, for the offense of falsifying official records, a punishment of not less than 12 years painful labor (defined as something greater than hard labor), while bound in chains, followed upon release by perpetual surveillance (akin but even more restrictive than parole), and perpetual inability to vote, hold offices of trust or profit, act as guardian, administrator, etc., is cruel and unusual punishment. Without too much struggle with the question, the Court there said that such minimum punishment did offend a right sense of justice and was in violation of the Eighth Amendment. *Weems,* however, does set down certain guidelines and these all speak of minimum or actual penalties imposed—not the utmost maximum penalty possible—the Court does not deal with abstractions.

Clearly, the penalty here imposed does not offend a right sense of fairness; the punishment, as all reviewing courts thus far have said, was required by the nature of the offense; and in fact is lenient and not in any sense cruel and unusual.

Conclusion.

For the reasons set forth above the Respondent, Joseph I. Woods, Sheriff of Cook County, Illinois urges that this Honorable Court deny the Petition for Writ of Certiorari to review the decision of the Court of Appeals for the Seventh Circuit in *United States ex rel. De Stefano* v. *Woods,* No. 16070, July 7, 1967.

Respectfully submitted,

JOHN J. STAMOS,
State's Attorney of Cook County, Illinois,
Attorney for Respondent.

ELMER C. KISSANE,
THOMAS A. HETT,
Assistant State's Attorneys,
Of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1967
No. 941

FRANK ANTHONY CARCERANO,

Petitioner,

vs.

CLARENCE T. GLADDEN, Warden of the Oregon State Penitentiary, or JOHN DOE, Acting Warden,

Respondent.

PETITION FOR A WRIT OF CERTIORARI.

After Order Denying Habeas Corpus by Supreme Court of the State of Oregon.

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IN THE

Supreme Court of the United States

October Term, 1967
No. .....

FRANK ANTHONY CARCERANO,

Petitioner,

vs.

CLARENCE T. GLADDEN, Warden of the Oregon State Penitentiary, or JOHN DOE, Acting Warden,

Respondent.

PETITION FOR A WRIT OF CERTIORARI.

To the Honorable Earl Warren, Chief Justice of the Supreme Court and to the Associate Justices; Greetings:

I.

The Petitioner respectfully requests Certiorari after having had his Petition for a Writ of Habeas Corpus denied by the Supreme Court of the State of Oregon.

II.

The denial was on 25 July 1967, and the letter notifying Petitioner is attached hereto and incorporated herein as Appendix A. The denial came without a hearing or an opinion.

III.

The Respondent, represented by the Attorney General of Oregon, filed a Memorandum in Opposition to Peti-

tion for Habeas Corpus which is attached hereto and incorporated herein as Appendix B.

IV.

Rule 19., 1.(a), 28 U.S.C.A. is cited by Petitioner as the basis for the review of the order denying the Great Writ; Rule 22., 1.; 28 U.S.C.A. indicates that this petition has been filed in the time allowed; and Rule 33., 3 (c)., 28 U.S.C.A. has been complied with by serving this petition upon the real parties in interest.

V.

Nine copies of the Petition for Habeas Corpus will be filed concurrently with this petition and are hereby incorporated as Appendix C. Thus, Appendix A., B. and C. now constitute the entire record of the proceedings in Habeas sought to be reviewed and Petitioner hereby so certifies.

VI.

Appendix C. is filed not in contravention of Rule 23., 3., 28 U.S.C.A., but hopefully in the spirit of Rule 21., 4., 28 U.S.C.A.

VII.

The question presented for review is whether the provision of the Oregon Constitution in Article I, Section II, providing for less than a unanimous jury verdict in a non-capital felony case is unconstitutional.

VIII.

The *Oregon Constitution,* Article I, Section 11 provides as follows:

"RIGHTS OF ACCUSED IN CRIMINAL PROSECUTION. In all criminal prosecutions, the accused shall have the right to public trial

by an impartial jury in the county in which the offense shall have been committed; to be heard by himself and counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor; provided, however, that any accused person, in other than capital cases, and with the consent of the trial judge, may elect to waive trial by jury and consent to be tried by the judge of the court alone, such election to be in writing; provided, however, that in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict, and not otherwise; provided further, that the existing laws and constitutional provisions relative to criminal prosecutions shall be continued and remain in effect as to all prosecutions for crimes committed before the taking effect of this amendment."

(Capital punishment was repealed, effective 30 November 1964, *Oregon Constitution* Article I, Sections 37 and 38.)

IX.

The facts alleged by Petitioner to the Supreme Court of Oregon are reiterated here verbatim (except the numbering and the lettering), because they indicate why it is imperative that certiorari be granted. The facts (again, exactly as alleged in Oregon):

"Comes now the petitioner, Frank Anthony Carcerano, and by this verified petition asks this court for a writ of habeas corpus pursuant to the Oregon Con-

stitution, Article I, §33[1] and Article VII (Amended) §2[2], and alleges:

A.

That Frank Anthony Carcerano is imprisoned, detained, confined and restrained of his liberty by Clarence T. Gladden, Warden of the Oregon State Penitentiary, and is presently serving a sentence of life imprisonment for armed robbery (ORS 163.280)[3] imposed by the Circuit Court for the County of Lane at Eugene, Oregon, on 11 May 1962 by the Honorable E. H. Howell, Judge *Pro Tempore*.

B.

That a copy of the Judgment of that court is attached to this Petition as Exhibit 'A'.

C.

That a copy of the Indictment is attached to this Petition as Exhibit 'B'.

D.

That your petitioner was tried and convicted by a jury of this offense on 11 May 1962 after four consecutive days of trial.

E.

That said imprisonment, detention, confinement and restraint are illegal; and petitioner is informed and

---

[1]Oregon Constitution, Art. I, §33. 'HABEAS CORPUS. The Privilege of the writ of habeas corpus shall not be suspended * * *'

[2]Article VII (Amended), §2. '* * * the supreme court may, in its own discretion, take original jurisdiction in * * * habeas corpus proceedings.'

[3]ORS 163.280 '* * * and robbery while armed with a dangerous weapon * * * shall be punished upon conviction by imprisonment for life * * *.'

believes and therefore alleges that the illegality thereof consists in this, to wit:

(1) That the verdict rendered, received and entered by the court on 11 May 1962 (and the ensuing judgment) was illegal, void and without force or effect, because it was rendered pursuant to the Oregon Constitution, Article I, §11[4] which provided that in a felony case, a decision of ten of the twelve jurors will suffice for conviction in derogation of petitioner's rights under the Federal Constitution, Amendments V, VI and XIV, and the applicable counterparts of the Oregon Constitution.

(2) That the petitioner is informed and believes and therefore alleges that the said verdict rendered, received and entered by the circuit court was less than the unanimous verdict of the jury; but void in any event because it was received under the Oregon Constitution, Article I, §11, and the instruction of the court to the jury appearing at page 393, lines 3 to 5, of the Transcript of Proceedings of the trial, which reads as follows:

> 'Now, this is a criminal case as distinguished from a civil case, and in this case it takes ten or more of your number to agree upon either one of these two verdicts * * *.'

---

[4]Oregon Constitution, Art I, §11. 'Rights of Accused in Criminal Prosecution. In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury * * * provided, however, that in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict, and not otherwise * * *.' (Adopted 18 May 1934) (Capital Punishment [Const. Art. 1, Sec. 37 and 38] Repealed-Effective 30 November 1964).

F.

That the petition is informed and believes, and on that ground alleges, that it does not appear in either the official records of the circuit court or in the Transcript of Proceedings of the "Full, true, accurate and complete record of the oral proceedings had in said cause"[5] whether or not the verdict was unanimous or whether the jury was polled on the guilty verdict entered.

G.

That the petitioner appealed—with counsel—from the judgment of conviction to this honorable court in *State v. Carcerano* (1964), 78 Ad. Or. Rep. 611* (390 P. 2d 923), certiorari denied (1964), 379 U.S. 891 (85 S. Ct. 165), and 380 U.S. 923 (85 S. Ct. 921), where his conviction was affirmed.

H.

That your petitioner did not raise the point here involved (namely, that the judgment is void because a verdict of less than a unanimous vote of the jury is allowed) in either court; and thus, is disabled from seeking relief under the Oregon Post-Conviction Hearing Act (ORS 138.510 to 138.680) because such ground could reasonably have been asserted in the direct appellate review proceeding(s),[6] (ORS 138.550 [2][6];

---

[5]Transcript of Proceedings, page 418, lines 6 and 7.

*238 Or. 208.

[6]ORS 138.500 (2). 'When the petitioner sought and obtained direct appellate review of his conviction and sentence, no ground for relief may be asserted by petitioner in a petition for relief * * * unless such ground was not asserted and could not reasonably have been asserted in the direct appellate review proceeding * * *'.

and, therefore, petitioner seeks habeas corpus. (ORS 138.540).[1]

I.

That your petitioner is asking and praying that this honorable court exercise its power of original jurisdiction in this case because your petitioner is asking this court to reconsider and overrule this court's decision in *State v. Osbourne* (1936), 154 Or. 484 (57 P. 2d 1083), (holding the Oregon Constitution, Article I §11 constitutional), which a lower court, obviously, cannot do.

J.

That *Osbourne* relied solely upon the ***obiter dictum*** in *Maxwell v. Dow* (1900), 176 U.S. 582, 20 S. Ct. 448, 44 L. Ed. 597, which (as will be seen) has, almost certainly, been overruled in recent years by the United States Supreme Court . . . the reasoning, the interpretation, and the law.

K.

That Points and Authorities are attached hereto and incorporated herein be reference as Exhibit 'C'.

L.

That your petitioner, Frank Anthony Cacerano, Oregon State Penitentiary Number 28711, was committed to the custody of the said Clarence T. Gladden, Warden of the Oregon State Penitentiary, on 12 May 1962, and has been in custody continuously since said time and has not been taken before any court or magistrate.

---

[1]ORS 138.540. '* * * With the exception of habeas corpus, all criminal law post-conviction remedies * * * are abolished in criminal cases.'

M.

That you petitioner is informed and believes, and on that ground alleges, that is not imprisoned, or restrained by virtue of any order, judgment, decree or process specified in ORS 34.330, except as specifically stated herein.

N.

That on or about 10 December 1963, while his appeal was pending in this court, the petitioner signed and then filed a petition for a writ of habeas corpus in the United States District Court for the District of Oregon; this petition was denied on or about 24 December 1963 by the Honorable Gus J. Solomon, United States District Judge; and on or about 10 January 1964 the same judge denied a certificate of probable cause, although allowing the notice of appeal from the denial of the petition for a writ of habeas corpus to be filed on or about 11 February 1964; but, the matter terminated on or about 11 February 1964 in an order signed by the Honorable Richard H. Chambers, Judge of the United States Court of Appeals for the Ninth Circuit, indicating that the appeal was frivolous and not taken in good faith, where the denial of habeas corpus was predicated upon the fact that the petitioner's appeal was still pending in this court.

O.

That indeed, the petitioner who was not represented by counsel in the proceedings above mentioned, now acknowledges that the petition was premature and was not meritorious because it alleged only that the state court system in Oregon held him illegally in involuntary servitude.

P.

That no other petition for a writ of habeas corpus has been made by or on behalf of said petitioner in regard to this imprisonment and restraint, in any court.

Q.

That the petitioner is a citizen of the United States of America.

R.

That the petitioner is suffering irrevocable injury in being held, detained and imprisoned.

S.

That the attorneys for the People of the State of Oregon, the District Attorney of Lane County, Eugene, Oregon, and the Attorney General of Oregon, were each served with a copy of this Petition at or before the time it was filed in this court.

T.

That the respondent, Clarence T. Gladden, Warden of the Oregon State Penitentiary, was served with a copy of this Petition at or before the time it was filed in this court.

U.

That the granting of a writ of habeas corpus is petitioner's only, plain, speedy and adequate remedy under the law.

Wherefore, your petitioner prays that a writ of habeas corpus may be granted,[8] directed to the said Warden of the Oregon State Penitentiary, Clarence T. Gladden,

[8]or in the alternative, that this Petition be deemed an application for relief pursuant to the Oregon Post-Conviction Hearing Act, if such be thought to be the correct remedy.

commanding him to have the body of Frank Anthony Carcerano, by whatsoever name he may be called or charged, before this court at a time and place therein to be specified, to do and receive what shall then and there be considered by this court concerning said prisoner and certify and return therewith the time and place and cause of said imprisonment or restraint before the court or judge hearing the writ; that the said petitioner may be restored to his liberty; and that the petitioner be granted such other and further relief as may be just and appropriate.

Respectfully submitted,

JOHN PATRICK COONEY, ESQ.,
of the Oregon State Bar, Associating,

WALTER L. KRONEBERGER, JR., ESQ.,
of the California State Bar,[9]

Dated: June 15, 1967.

WALTER L. KRONEBERGER, JR.,[10]
Attorneys for Petitioner.

---

[9]ORS 9.240. 'Appearance of Attorneys Licensed in other Jurisdictions. An attorney of the highest court of record in any other state * * * may appear, if associated with an active member of the Oregon State Bar, as counsel for a party in a particular action, suit or proceeding in court, or before a judicial officer of this state.'

[10]The certificate of the Clerk of the Supreme Court of California concerning the eligibility of Walter L. Kroneberger, Jr., to practice law is attached hereto and incorporated herein by reference as Exhibit 'D'.

X.

The arguments advanced by petitioner to the Supreme Court of Oregon are reiterated here verbatim* —may it please the court:

ARGUMENT.

The Provision of the Oregon Constitution in Article I, Section 11, Providing for Less Than a Unanimous Jury Verdict Is Unconstitutional.

> "The basic elements of English common-law jury trial thus guaranteed are: (1) that the jury should consist of twelve persons; (2) that the trial should be supervised by a judge with power to instruct as to the law and to comment on the evidence; and (3) that the verdict be unanimous."
>
> *13 Encyclopaedia Britannica,* Jury, p. 160.

Thompson v. Utah (1898), 170 U.S. 343 (18 S. Ct. 620) tells us that the "jury" defined under the Sixth Amendment for the Federal Government is the common law jury defined in the encyclopaedia . . . twelve men, no more, no less, arriving at a unanimous verdict.

Maxwell v. Dow (1900), 176 U.S. 582 (20 S. Ct. 448), the keystone of *Osbourne,* used *Hurtado v. California* (1884), 110 U.S. 516 (4 S. Ct. 111) to show that if a state wasn't bound by the edict of the Fifth Amendment to procure an indictment as is required of our nation, then a state is not bound to give a criminal defendant a common law jury.

This concept is not inaccurate history; it is unfortunate and spurious logic because in *Hurtado* the defendant received *more* protection from the California

*Except the numbering of footnotes.

scheme of a preliminary hearing,[11] than from a grand jury indictment. In *Dow* the defendant got *less*: eight instead of twelve jurrors.

Harlan, *J.*, dissenting in *Dow* said this:

> "If it be said that there need be no apprehension that any State will strike down the guarantees of life and liberty, which are found in the National Bill of Rights, the answer is that the plaintiff in error is now in the penitentiary of Utah as the result of a mode of trial that would not have been tolerated in England at the time American independence was achieved * * *"

Mr. Justice Harlan then must have forgotten *Barron v. Baltimore* (1883), 7 Pet. 243 (32 U.S. 242), where Mr. Chief Justice John Marshall held for the majority,

> "These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them. * * * This court, therefore, has no jurisdiction of the cause, and it is dismissed."

Even after the Fourteenth Amendment was ratified on 28 July, 1869, it was said that

> "due process of law does not, in and of itself, require a jury trial in a criminal case * * *
>
> *16 A.C.J.S. Constitutional Law,* Sec. 590, p. 655.
>
> *Hughes v. Heinze* (1959), 9 Cir., 258 F.2d 864.

---

[11]With a right to be admitted with counsel to a judicial hearing—open or closed at defendant's whim—where a motion to dismiss can be carried to the United States Supreme Court . . . transcript provided. *California Constitution,* Art. I, sec. 8 and Penal Code sections 58 to 873, 875 to 883 and 995.

If the last two quotations actually constitute the free-wheeling authority of each state, then how in the world can Petitioner then assert to this court that it has the duty to give Petitioner a common law jury . . . a fair trial.

The Assertion is made because on the one hand either [A] the Fourteenth Amendment by itself now demands that Oregon afford a suspected felon the same unanimous jury as is required in forty-eight[12] of the other states[13] and the United States *or* [B] the Fourteenth Amendment incorporates the Sixth Amendment and/or the Fifth.

A. The Fourteenth Amendment Requires a Unanimous Jury.

The Supreme Court has said:

> "It is possible that some of the personal rights safeguarded by the first eight amendments against national action may also be safeguarded against state action, because a denial of them would be a denial of due process of law."
>
> *Twining v. New Jersey*[14] (1908), 211 U.S. 78 (29 S. Ct. 14)

And years later:

> "* * * The due process provision of the Fourteenth Amendment—just as that in the Fifth—has

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[12]The other state, Louisiana, requires a unanimous jury of twelve only in capital cases; if punishment *may* be hard labor, a unanimous jury of five is sufficient; if punishment *must* be hard labor, then nine of twelve can reach a verdict. La. Const. Art. VII, sec. 41.

[13]Idaho (const. art. I, sec. 7), Montana (art. 3, sec. 23) and Oklahoma (art. 2, sec. 19) allow less than unanimous for misdemeanors.

[14]Overruled in its holding by *Malloy v. Hogan* (1964), 378 U.S. 1 (84 S. Ct. 1489), but not the quoted prognostication.

led few to doubt that it was intended to guarantee procedural standards, adquate and appropriate, then and thereafter, to protect, at all times, people charged or suspected of crime by those holding positions of power and authority. *Chambers v. Florida* (1940), 309 U.S. 227 (60 S. Ct. 472).

"* * * 'the trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law and if it has so great an advantage over others in regulating civil property, how much must that advantage be heightened when it is applied to criminal cases! * * *

[It] is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in property, his liberty, or his person, but by the unanimous consent of twelve of his neighbors and equals.'"

3 Blackstone's Commentaries 397 cited in *Griffin v. Illinois* (1956), 351 U.S. 12 (76 S. Ct. 585) and *Reid v. Covert* (1957), 354 U.S. 1 (77 S. Ct. 1222).

"There is no right more sacred to our institutions of government than the right to a public trial by a fair and impartial jury; no wrong more grevious than its denial, and no greater duty is enjoined upon the courts than to preserve that right untarnished and undefiled. The denial of a fair and impartial trial, as guaranteed by the 6th Amendment to the Constitution, is also a denial of due process, demanded by the 5th and 14th Amendments, and the failure to strictly observe these constitutional safeguards renders a trial and conviction or a criminal offense illegal and void and redress therefor is within the ambit of habeas

corpus. Ex parte Hans Nielsen, Petitioner, 131 U.S. 176, 9 S.Ct. 672, 33 L.Ed. 118; In re Bonner, Petitioner, 151 U.S. 242, 259, 14 S.Ct. 323, 38 L.Ed. 149; Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1416; Bowen v. Johnston, 306 U.S. 19, 59 S.Ct. 442, 83 L.Ed. 455, and Huntley v. Schilder, 10 Cir., 125 F.2d 250. Cf. Frank v. Mangum, 237 U.S. 309, 35 S.Ct. 582, 59 L.Ed. 969; Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791, 98 A.L.R. 406, and Lisenba v. California, 314 U.S. 219, 62 S.Ct. 280, 86 L.Ed.—."

Baker v. Hudspeth (1942), 129 F.2d 779, 781. (At page 782, *Baker* mentions the common law jury.)

The test or the tests under the due process clause itself are roughly contained in some general language: the "* * * state prosecutions must, at the least, comport with the 'fundamental conception' of a fair *trial*" *Estes v. Texas* (1965), 381 U.S. 560 (85 S. Ct. 1628, 1641); the right envoked must be fundamental (*Betts v. Brady* (1942), 316 U.S. 455 [62 S. Ct. 1252]); and in *Spencer v. Texas* (1967), ... U.S. ..... (87 S. Ct. 648); (A) Whether such a procedure undermines "* * * the very integrity of the fact finding process" and (B) involves "* * * a clear danger of convicting the innocent."

Though rough, though general, the application is very fine, even specific. Two recent cases show this: *Sheppard v. Maxwell* (1966), 384 U.S. 338 (86 S. Ct. 1507) and *Pate v. Robinson* (1966), 383 U.S. 377 (86 S. Ct. 836).

Sheppard, denied certiorari in 1956 (352 U.S. 910, [77 S. Ct. 118]), didn't have a "fair trial", because

of circus-type publicity in both pre-trial and trial phases. This violates D.P.[15]

Pate, denied certiorari in 1962 (368 U.S. 995 [82 S. Ct. 618]), didn't have a "fair trial" because his competency to stand trial had not been determined. This volates D.P.[16]

Does it violate D.P. to deny the accused a unanimous verdict? Stated conversely, is the requirement of a unanimous verdict in a criminal case an essential element of due process?

> "* * * the requirement of a unanimous verdict is nowhere defined in the constitution as 'a privilege to be enjoyed.' It is the inescapable element of due process that has come down to us from earliest time."
>
> *Hibdon v. U.S.* (1953), 6th Cir., 204 F. 2d 834, 838 (37 A.L.R. 2d 1130);
>
> cited *31 Am. Jur.,* Jury, sec. 10, p. 17.

Dictum in *Fournier v. Gonzales* (1959), 269 F. 2d 26 is *contra* to *Hibdon,*[17] but the court agreed that the "* * * essence of due process [is] that the guilt of the accused must be established by the government beyond a reasonable doubt."

But that is the very reason *Hibdon* gives for demanding unanimity.

> "The unanimity of a verdict in a criminal case is inextricably interwoven with the required measure

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[15]Due Process.

[16]See also, *Turner v. Louisiana* (1965), 379 U.S. 472 (85 S. Ct. 546) bailiffs were witnesses; and cf. *Parker vs. Gladden* (1966) ..... U.S. ..... (87 S. Ct. 468), 5 L. Week 4097.

[17]Citing *Walker v. Sauvinet* (1875), 92 U.S. 90 (23 L. Ed. 678).

of proof. To sustain the validity of a verdict by less than all of the jurors is to destroy this test of proof for there cannot be a verdict supported by proof beyond a reasonable doubt if one or more jurors remain reasonably in doubt as to guilt. It would be a contradiction in terms. We are of the view that the right to a unanimous verdict cannot under any circumstances be waived, that it is of the very essence of our traditional concept of due process in criminal cases, and that the verdict in this case is a nullity because it is not the unanimous verdict of the jury as to guilt."

"* * * It need hardly be demonstrated that to secure conviction a zealous prosecutor would carry a far lighter burden of persuasion in convicting a majority of the jury than in persuading all of its members; that unjust convictions would be increased rather than reduced, and the traditional measure of proof in criminal cases completely destroyed."

Hibdon v. U.S. (supra).

Again, Mr. Justice Harlan dissenting in *Dow, supra,* says, "It does not meet the case to say that a trial by eight jurors is as much a trial by jury as if there were twelve jurors; for if a citizen charged with crime can be subjected to trial by a less number of jurors than that prescribed by the Constitution, the number may be reduced to three."

In *Trail by Jury,* Moschzisker, 2d Ed. (1930), p. 300, the author suggests that a verdict from less than all, tends to exclude the influence of the more conservative, deliberate and just jurors.

"Guilt must be established beyond a reasonable doubt. All twelve jurors must be convinced beyond that doubt; if only one of them fixedly has a reasonable doubt, a verdict of guilty cannot be returned. These principles are not pious platitudes recited to placate the shades of venerated legal ancients. They are working rules of law binding upon the court."

Belleci v. U.S. (C.A.D.C.), 184 F. 2d 394, 403.

It is reversible error not to instruct a jury upon the requirement of unanimity. *People v. Hicks,* 287 N.Y. 165, 38 N.E. 2d 482 (138 A.L.R. 1222); *People v. Green,* 47 Cal. 2d 209 (302 P. 2d 307); *U.S. v. Puff* (2d Cir.), 211 F. 2d 171; *Andrews v. U.S.,* 333 U.S. 740 (68 S. Ct. 880); *State v. Harris* (1959), 152 A. 2d 106.

Something less was asked of the prosecutor; more and easier convictions ensued after Oregon struck down the unanimous jury. The real proof, the sad proof of this last statement is that when Oregon had capital punishment Oregon asked something more of the prosecutor[18] to obtain a death penalty. So does every state with such punishment.

Yet the distinction—treating one defendant different than another—is untenable, unfair and unconstitutional[19]

Mr. Justice Clark says:

"I must conclude here, as in Kinsella, supra, that the Constitution makes no distinction between capital and noncapital cases. The Fourteenth

[18] *State v. Imish,* 281 P. 2d 973 (..... Ore. .....).

[19] *Griffin v. Illinois* (1956), 351 U.S. 12 (76 S. Ct. 585) (free transcripts) on due process and equal protection.

> Amendment requires due process of law for the deprival of 'liberty' just as for deprival of 'life,' and there cannot constitutionally be a difference in the quality of the process based merely upon a supposed difference in the sanction involved. How can the Fourteenth Amendment tolerate a procedure which it condemns in capital cases on the ground that deprival of liberty may be less onerous than deprival of life—a value judgment not universally accepted—or that only the latter deprival is irrevocable? I can find no acceptable rationalization for such a result, and I therefore concur in the judgment of the Court."
>
> *Gideon v. Wainwright* (1963), 372 U.S. 335 (83 S. Ct. 792, 799).

Gideon, of course, is on the right to counsel; that the distinction can no longer be maintained on a right to a jury trial on capital or non-capital cases, please review *Kinsella v. U.S.* (1960), 361 U.S. 234;[20] *Grisham v. Hagen* (1960), 361 U.S. 278;[21] and *McElroy v. U.S.* (1960), 361 U.S. 281.[22]

The right to a jury today is a *right,* further, it is a fundamental right. *Reid v. Covert* (1957), 354 U.S. 4, (77 S. Ct. 1222, 1226-1227); *U.S. v. Maroney* (1966), 3rd Cir, 355 F.2d 302.

> "The cases show * * * that because the court has come to regard the criminal jury trial as a fundamental constitutional *safeguard,* historical barriers to the use of juries are in jeopardy." (Italics added.)
>
> *32 Univ. of Chicago L.Rev.,* 311, 314.

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[20]Non-capital.
[21]Capital.
[22]*Contra, In re Ross* (1890), 140 U.S. 453.

Mr. Justice Douglas calls the right a "safeguard." He says, "the most significant of these (constitutional guarantees for the accused) is the right to trial by jury, one of the most important safeguards against tyranny which our law has designed." That was in *Lee v. Madigan* (1959), 358 U.S. 228, 234.

* * *

B. The Fourteenth Amendment Incorporates the Sixth Amendment and/or the Fifth Amendment.

Truly, *Osbourne* should fall and take part of Article I, Section 11 with it on the strength of the Fourteenth Amendment alone (*supra* "A").

However, even a stronger argument can be made if the Fourteenth indeed picks up the due process clause (the "substantial right" cases above) of the Fifth Amendment and/or the right to an impartial jury clause of the Sixth Amendment.

Little could be gained by trying to decide in this section of the Points and Authorities whether the cases we mention are part of a federal theory to have the first eight amendments consumed by the Fourteenth or whether a particular case is part of a process of absorption or selective incorporation or whatever, but the fact remains that current history shows that each clause of each of these amendments is succumbing or has succumbed—like the proverbial sitting ducks in the shooting gallery.

Too generous a statement? Probably for two reasons only: First: a case like *Hurtado* (*supra*) where California actually does more than dictated by the Fifth Amendment; and Second: A case that won't come up. An example might be the clause of the Eighth Amend-

ment against excessive fines: The United States District Court generally has a more whopping fine than any state court.

But as to the amendments—the clauses that have been swept up by the Fourteenth:

The following cases show the First Amendment:

Gitlow v. New York, 268 U.S. 652, 666, 45 S. Ct. 625, 629 (speech and press); *Lovell v. City of Griffin,* 303 U.S. 444, 450, 58 S. Ct. 666, 668 (speech and press); *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S. Ct. 710 (speech and press); *Staub v. City of Baxley,* 355 U.S. 313, 321, 78 S. Ct. 277, 281 (speech); *Grosjean v. American Press Co.,* 297 U.S. 233, 244, 56 S. Ct. 444, 446 (press); *Cantwell v. Connecticut,* 310 U.S. 296, 303, 60 S. Ct. 900, 903 (religion); *DeJonge v. Oregon,* 299 U.S. 353, 364, 57 S. Ct. 255, 259 (assembly); *Shelton v. Tucker,* 364 U.S. 479, 486, 81 S. Ct. 247, 251 (association); *Louisiana ex rel. Gremillion v. N.A.A.C.P.,* 366 U.S. 293, 296, 81 S. Ct. 1333, 1335 (association); *N.A.A.C.P., v. Button,* 371 U.S. 41, 83 S. Ct. 328 (association and speech); *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar,* 377 U.S. 1, 84 S. Ct. 1113 (association.)

Griswold v. Connecticut (1965), 381 U.S. 479 (85 S. Ct. 1678) is unique. It indicates that the Fourteenth protects the rights of privacy under the First, the Third, the Fourth, the Fifth and the Ninth Amendments.

Next case: Under the Fourth, *Wolf v. Colorado* (1949), 338 U.S. 25 (69 S. Ct. 1359) is overruled by *Mapp v. Ohio* (1961), 367 U.S. 643 (81 S. Ct. 168)

which remembered, "the great case" of *Boyd v. U.S.* (1886), 116 U.S. 616 (6 S. Ct. 524) because of the concept developed that the Fourth and Fifth were running "almost into each other" (116 U.S. at 630; 6 S. Ct. at 532).

FIFTH AMENDMENT:

(1) *Indictment. Hurtado* (*supra*) as stated twice, is innocuous if the preliminary hearing is afforded;

(2) *Jeopardy. Palko v. Connecticut* (1937), 302 U.S. 319 (58 S. Ct. 149) is Cardosa developing law. The concept of "ordered libery," etc. Justice Black on the dissent in a five-four case, *Bartkus v. Illinois* (1959), 359 U.S. 122 at 151 (79 S. Ct. 676 at 696) was so upset by both of these cases that he acknowledged only that *Palko* had allowed a state to appeal, but left open the question of whether the state could be permitted after a trial free from error to try the accused again. *Bartkus,* which held that an acquittal in the Federal Court was no bar to a state conviction, so upset Governor William G. Stratton that he commuted the defendant's life sentence to time served.[23]

The make-up of the court today would almost assure overruling unfair *Palko* and *Bartkus*. That one court agrees, see the precise holding that double jeopardy can not and will not be tolerated—by the Second Circuit Court in a powerhouse opinion. *United States ex rel. Hetenyi v. Wilkins* (1965), 2d Cir., 348 F.2d 844 (cert. den. 375 U.S. 980, 383 U.S. 913 [84 S. Ct. 495]).

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[23] *One Man's Stand For Freedom,* Black-Dilliard (1963), p. 321.

(3) *Incrimination. Twining v. New Jersey* (1908), 211 U.S. 78 (29 S. Ct. 14), a landmark thirty years before *Palko* was overruled in 1964. The case is *Malloy v. Hogan,* 378 U.S. 1,[24] (84 S. Ct. 1489). *Malloy* didn't overrule *Cohen v. Hurley* (1961), 366 U.S. 117 (83 S. Ct. 954) which excepted lawyers from people with a right not to incriminate themselves, but this year *Spevak v. Klein* (1967), ... U.S. .... (87 S. Ct. 625) reversed, holding that lawyers are "persons" and the self incrimination clause of the Fifth is incorporated by the Fourteenth.

Also by the wayside fell, *Adamson v. California* (1947), 332 U.S. 46 (67 S. Ct. 1672) with the same defense lawyer in each case protesting that the prosecutor should not be able to remark to the jury about the defendants' failure to testify. *Griffin v. California* (1965), 380 U.S. 616 (85 S. Ct. 1229).

(4) *Due Process. Hurtado* (*supra*) for one, has been overruled to the extent it holds fourteenth doesn't pick up the due process clause of the fifth amendment. *Jackson v. Denno* (1964), 378 U.S. 368 (84 S. Ct. 1774) is a fine example of the United States Supreme Court working out procedural due process—fifth, fourteenth. *Jackson* said when a specific federal constitutional right is involved, the Supreme Court will design or impose procedure to protect that right.

(5) *Just Compensation.* See *Chicago B. & Q. R.R. Co. v. City of Chicago* (1897), 166 U.S. 226 (17 S. Ct. 581).

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[24]In Accord, *Miranda v. Arizona* (1966), 384 U.S. 512 (86 S. Ct. 1602).

SIXTH AMENDMENT:

(1) *Speedy and Public Trial,* the "speedy" aspect is in *Klopper v. North Carolina* (1967), ... U.S. ..... (87 S. Ct. 988). The "public" aspect is in *In re Oliver,* 333 U.S. 257 (68 S. Ct. 499). The "trial" aspect was given attention in *Estes (supra)* at page 1641 of 85 S. Ct.

(2) *Impartial Jury. Parker v. Gladden* (1966), ... U.S. .... (87 S. Ct. 468) reads:

> "We believe that the statement of the bailiff to the jurors are controlled by the command of the Sixth Amendment made applicable to the States through the Due Process Clause of the Fourteenth Amendment. It guarantees that 'the accused shall enjoy the right to a . . . trial, by an impartial jury . . . [and] be confronted with the witnesses against. . . .' As we said in *Turner v. Louisiana,* 379 U.S. 466, 472-473 (1965), "the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is free judicial protection of the defendant's right of confrontation, of cross-examination and of counsel." Here there is neither dispute as to what the bailiff, an officer of the State, said nor that when he said it he was not subjected to confrontation, cross-examination or other safeguards guaranteed to the petitioner. Rather, his expressions were 'private talk,' tending to reach the jury by 'outside influence.' *Patterson v. Colorado,* 205 U.S. 454, 462 (1907). We have followed the 'undeviating rule,' *Shepherd v. Maxwell,* 374 U.S. 333, 351 (1966), that the right of confrontation and cross-examination are among the fundamental requirements of a constitutionally

fair trial. *Kirby v. United States,* 174 U.S. 47, 55, 56 (1899); *In re Oliver,* 333 U.S. 257, 273 (1948); *Pointer v. Texas,* 380 U.S. 400 (1965)."

Most surely, the word "jury" is entitled to as much emphasis as the word "impartial".

If that is true then *Parker* controls this petition for habeas, *i.e.* if the fourteenth does in fact focus on the sixth, then we already know the sixth demands a common law jury—Judge—Twelve jurors—impartial—unanimous.[25]

(3) *Arraignment*—Please notice *Cole v. Arkansas,* 333 U.S. 196 (68 S. Ct. 514).

(4) *Confrontation—Stein v. New York,* 346 U.S. 156 (74 S. Ct. 1077) and *West v. Louisiana,* 194 U.S. 258 (24 S. Ct. 650), holding no "pick-up" by the state due process clause, are both overruled by *Pointer v. Texas* (1965), 380 U.S. 400 (85 S. Ct. 1065) and *Douglas v. Alabama* (1955), 380 U.S. 415 (85 S. Ct. 1074).

(5) *Subpoena*[26]

(6) *Right to Counsel—Johnson v. Zerbst* (1938), 304 U.S. 458 on federal right to an attorney: "judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by habeas corpus.

Betts v. Brady, 316 U.S. 455, 62 S. Ct. 1252 said that 14 did not pick up 6 and that a right to counsel

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[25]*Contra.* The casual observation of Mr. Justice Harlan in dissent in *Parker,* 'inconsequential incidents in an otherwise constitutionally flawless proceeding * * *"

[26]No case found to date.

was not a fundamental right so that 5 couldn't be picked up either. Then the famous case of *Gideon v. Wainwright* (1963), 372 U.S. 335 (83 S. Ct. 792),[27] held the opposite.

SEVENTH AMENDMENT:

Walker[28] (*supra*) still seems the law here . . . in civil.

EIGHTH AMENDMENT:

Cruel and Unusual—Robinson v. California (1962), 370 U.S. 660 (82 S. Ct. 1417), has the state bound by the eighth thus overruling *O'Neil v. Vermont*, 144 U.S. 323 (12 S. Ct. 693) and *Louisiana v. Resweber* (1947), 329 U.S. 459 (67 S. Ct. 374).

XI.

Walter L. Kroneberger, Jr., Esq., a member of the California Bar, has agreed with Petitioner to become a member of this bar to argue this matter orally.

WHEREFORE, petitioner prays for his life and respectfully begs this court to review the order refusing the Great Writ to petitioner who was absolutely denied the common law jury promistd to all Americans as a constitutional right.

FRANK ANTHONY CARCERANO

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[27] *Gideon's Trumpet*, Lewis (1964) at p. 173 (Random House) says that twenty-three states urged the overthrow of *Betts*.

[28] *Walker v. Sauvinet* (1875), 92 U.S. 90 (23 L. Ed. 678).

APPENDIX

APPENDIX A.

Seal

F. M. Sercome, Clerk

State of Oregon
SUPREME COURT
Salem 97310
July 25, 1967

Mr. John Patrick Cooney
Attorney at Law
1005 East Main Street
Medford, Oregon 97501

Mr. Walter L. Kroneberger, Jr.
Attorney at Law
1436 Marcelina Avenue
Torrance, California 90503

Re: Carcerano v. Gladden

Gentlemen:

I am directed to inform you that the Court has today denied petitioner's petition for writ of habeas corpus in the above matter.

Very truly yours,
F. M. Sercombe
Clerk

FMS:ek
cc: Mr. David H. Blunt
Assistant Attorney General
Supreme Court Building
Salem, Oregon 97310

APPENDIX B.

Memorandum in Opposition to Petition for Habeas Corpus.

In the Supreme Court of the State of Oregon.

Frank Anthony Carcerano, Petitioner, vs. Clarence T. Gladden, Warden of the Oregon State Penitentiary, or John Doe, Acting Warden, Respondent.

Petitioner has brought a broadside attack upon the provisions of Article I, § 11, Oregon Constitution allowing conviction in circuit court prosecutions by verdict of ten members of the jury, on the basis that a less than unanimous verdict denied him due process of law under the United States Constitution. He asks this Court to reverse its holding in State v. Osburne, 153 or 484, 57 P2d 1083 (1936), relying mostly upon the language of the United States Supreme Court's per curiam opinion in Parker v. Gladden, ... U.S. ....., 17 L Ed2d 420, 87 S Ct 468 (1966) to the effect that a criminal defendant is entitled to be tried by twelve impartial and unprejudiced jurors.

Having been the respondent in the Parker case as well as here, respondent submits that the facts in *Parker* are not controlling herein. The language of the Supreme Court in that case was in response to an argument that based upon the evidence adduced at the post conviction hearing the judge should not have made a finding of fact that petitioner in that case was prejudiced by improper remarks of the trial bailiff because

respondent felt that the record did not show that enough jurors heard the remarks to warrant such a finding. *Parker* neither expressly nor by implication requires a unanimous verdict to validate a conviction, although it does require that none of the jurors be subjected to conduct of an officer of the court that may result in a juror becoming prejudiced against the defendant.

It is well established that convictions based on less than unanimous verdicts do not violate due process of law. Jordan v. Massachusetts, 325 U.S. 167, 32 S Ct 651, 56 L Ed 1038 (1912); Fournier v. Gonzales, 269 F2d 29 (1st CCA 1959) cert den sub nom, Sampredo v. People of Puerto Rico, 359 US 931, 3 L Ed2d 633, 79 S Ct 610.

Respectfully submitted,

Robert Y. Thornton
Attorney General
David H. Blunt
Assistant Attorney General
Attorneys for Respondent

Certified to be a true and correct copy of the original and of the Writs thereof. David H. Blunt, Assistant Attorney General. Of Attorneys for Respondent.

State of Oregon, County of Marion—ss.

I hereby certify that on the 12th day of July, 1967, I served the within MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS upon John Patrick Cooney and Walter L. Kroneberger, Jr., Attorneys for Petitioner, by then depositing in the United States Post Office at Salem, Oregon, a full, true and correct copy thereof, addressed to the said John Patrick Cooney at 1005 E. Main Street, Medford, Oregon 97501; and the said Walter L. Kroneberger, Jr., at 1436 Marcelina Avenue, Torrance, California 90503, and fully prepaying the postage thereon to each said attorney.

David H. Blunt
Assistant Attorney General
Of Attorneys for Respondent

APPENDIX C.

Appendix C is merely composed of nine copies of the printed petition for habeas corpus in the Supreme Court in Oregon.

LIBRARY
SUPREME COURT, U. S.

FILED
APR 1 1968
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 941

FRANK ANTHONY CARCERANO,

Petitioner,

v.

CLARENCE T. GLADDEN, Warden, Oregon State Penitentiary,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

ROBERT Y. THORNTON
Attorney General of Oregon

DAVID H. BLUNT
Assistant Attorney General
322 State Office Building
Salem, Oregon 97310
Phone 364-2171, ext 315, 1717
Attorneys for Respondent

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 941

FRANK ANTHONY CARCERANO,

Petitioner,

v.

CLARENCE T. GLADDEN, Warden,
Oregon State Penitentiary,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

JURISDICTION

Petitioner asserts that the jurisdiction of this Court is based upon U. S. Supreme Court Rule 19 (1)(a), 28 U.S.C.A. The respondent denies that such jurisdiction lies since the Oregon Supreme Court has decided no federal question. There is no federal constitutional right to compel a jury trial in a state court, much less to delineate any procedural matter therein beyond the basic requirement of due process. Due process having been ensured by the state guarantee of a fair and unbiased jury, the procedural manner in which the jury reached

its decision presents no federal question, absent a showing of individual prejudice or discrimination.

ARGUMENT

Petitioner was not denied due process by Art. I, § 11, of the Oregon Constitution, which provides for criminal conviction in non-capital cases by a determination of ten members of a twelve-man jury.

The petitioner attempts to connote the federal courts' requirement of a jury trial into a directive compelling a unanimous jury verdict in a state court proceeding. This ignores the initial incongruity of the lack of requirement of a jury in a state court. *Fay v. New York*, 332 U.S. 261, 288, 67 S.Ct. 1613, 91 L.ed. 2043 (1947); *Snyder v. Comm. of Massachusetts*, 291 U.S. 97, 105, 54 S.Ct. 330, 78 L.ed. 674 (1934); *Maxwell v. Dow*, 176 U.S. 581, 602-603, 20 S. Ct. 494, 44 L.ed. 597 (1900).

The factors that govern the present case are best illustrated by *Fay v. New York*, supra, which held that to fall on constitutional grounds a conviction must result from a trial procedure so unfair as to take liberty without due process of law. *Fay* noted that:

> "* * * [I]t steadily has been ruled that the commandments of the Sixth and Seventh Amendments, which require jury trial in criminal and certain civil cases, are *not* picked up by the due process clause of the Fourteenth so as to become limitations on the states. 'This court has ruled that consistently with those amendments trial by jury *may be modified by a state or* abolished altogether.' *Palko v. Connecticut*,

302 US 319, 324, 58 S Ct 149, 82 L ed 288, and cases there cited . . ." (Emphasis supplied) *Fay v. New York*, supra, at 288.

This same case described what the function of the Court was regarding supervision of state juries:

> "The function of this federal Court under the Fourteenth Amendment in reference to state juries is not to prescribe procedures but is essentially to protect the integrity of the trial process by whatever method the state sees fit to employ . . ." *Id.* at 294.

It then becomes apparent that the standards of due process and equal protection are not whether a jury is unanimous, but that all possible defendants receive the same treatment and that this treatment, as far as juries are concerned, is the provision of an unbiased and impartial body to hear the defendant's case and rule thereon.

A recent Oregon case dealt slightly with this constitutional qualification for a jury verdict. *Parker v. Gladden*, 385 U.S. 363, 87 S.Ct. 468, 17 L.ed.2d 420 (1966) was reversed because of a remark of the bailiff to a juror which indicated Parker's guilt. The State argued no prejudice since only ten members of the jury had to concur. In reversing, this Court did *not* strike the Oregon provision. The Court merely said that a defendant must be allowed *impartial consideration* by *all* jurors but it made no further reference to the internal trial procedures of the state court.

When *Fay* indicated that a jury procedure could be

modified as long as the resulting procedures were fair, it echoed *dicta* expressed in an earlier case of this Court,

> "In criminal cases due process of law is not denied by a state law which dispenses with a grand jury indictmeht and permits prosecution upon information, nor by a law which dispenses with the necessity of a jury of twelve, or unanimity in the verdict . . ." *Jordan v. Massachusetts*, 225 U.S. 167, 176, 32 S.Ct. 651, 56 L.ed 1038 (1912).

Respondent submits that these statements are still valid today and in consideration of the arguments presented above and those contained in respondent's memorandum to the lower court (Petitioner's Appendix B) that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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AUG 27 1968

IN THE

Supreme Court of the United States

October Term, 1967
No. 941,
(and 559)

FRANK ANTHONY CARCERANO,

Petitioner,

vs.

CLARENCE T. GLADDEN, WARDEN OF THE OREGON STATE PENITENTIARY, JOHN DOE, acting Warden,

Respondent.

PETITION FOR A REHEARING.

FRANK ANTHONY CARCERANO,
Box 28711,
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Salem, Oregon 97310,
Attorney in Propria Persona.

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PETITION FOR A REHEARING.

To the Honorable, the Supreme Court; Greetings:

I.

Preface.

The petitioner with great respect offers three ideas as to why a rehearing should be granted and the Order of the Oregon court denying the great writ of habeas corpus[1] should be vacated:

FIRST: This honorable court denied the petitioner Due Process and the Right to Counsel;

SECOND: The petitioner's argument that the Oregon ten-out-of-twelve constitutional amendment violates due process was ignored; and

[1]Not a "post-conviction statute" as stated by this court. (Pg. 1 of Petition for a Writ of Certiorari and Appendix "A" thereof.)

THIRD: The prospective-or-retroactive fiction is legislation and should not properly be applied to petitioner—if anyone.

II.

Three Ideas.

FIRST: THIS HONORABLE COURT DENIED THE PETITIONER DUE PROCESS AND THE RIGHT TO COUNSEL:

A. *Due Process:* A simple assertion, obvious, possibly well taken: an American in prison for life, allowed into the forum might well under a concept of "ordered liberty" be allowed to brief, meet and argue the points deemed by this court to be decisive; and

B. *The Right to Counsel* should be afforded if in the constitutional scheme of things the Petition for a Writ of Certiorari is part of the ball game. This of course is a concept that makes *Griffin v. Illinois* (1956), 351 U.S. 12 (76 S. Ct. 585), interesting to mention here.

True, the petitioner is technically without an attorney of record, but one had said an appearance would be made.[2]

SECOND: THE PETITIONER'S ARGUMENT, THAT THE OREGON TEN-OUT-OF-TWELVE CONSTITUTIONAL AMENDMENT VIOLATES DUE PROCESS WAS IGNORED:

It does.[3]

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[2]Page 26, Pet. for a Writ of Certiorari.

[3]And *contra,* Dicta from all sides in *Duncan v. Louisiana* (1968) ..... U.S. ..... (88 S. Ct. 1444), *"A criminal process which was fair and equitable but used no juries is easy to imagine"* from footnote of majority (Italics added); "I see no reason whatever, for example, to assume that our decision today should require us to impose federal requirements such as unani-

"'There is no right more sacred to our institutions of government than the right to a public trial by a fair and impartial jury; no wrong more grievous than its denial, and no greater duty is enjoined upon the courts than to preserve that right untarnished and undefiled. The denial of a fair and impartial trial, as guaranteed by the 6th Amendment to the Constitution, is also a denial of due proces, demanded by the 5th and 14th Amendments, and the failure to strictly observe these constitutional safeguards renders a trial and conviction or a criminal offense illegal and void and redress therefor is within the ambit of habeas corpus. (citations)."

Baker v. Hudspeth (1942), 129 F. 2d 779, 781. (Pet. for a Writ of Certiorari, pg. 14.)

Doesn't *Stovall v. Denno* (1967) ..... U.S. ..... (87 S. Ct. 1967 go on and do just what this petitioner suggests.[4]

Using the test of reasonable doubt—and to a moral certainty—isn't it obliterated when you think of the prosecution winning with two admitted holdouts, killing all of the great stories of the famous defense lawyers with their magic and the 11 to 1. This is America.

THIRD: THE PROSPECTIVE-OR-RETROACTIVE FICTION IS LEGISLATION AND SHOULD NOT PROPERLY BE APPLIED TO PETITIONER—IF ANYONE:

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mous verdicts or a jury of 12 upon the States." Mr. Justice Fortas, concurring; and then the dissent, a "'jury of exactly twelve' (Citation) is not fundamental to anything; there is no significance except to mystics in the number 12."

[4]Examine the due proces clause.

It must surely be better to let one innocent man stay in prison than to let nine guilty go free.

This court, part of this court, has done tragic things to implement the *TRUTH* of the last paragraph;

Using the *Stovall* test in petitioner's case,[5] (2) *the purpose to be served by the new standards,* (b) *the extent of the reliance by law enforcement authorities on the old standards, and* (c) *the effect on the administration of justice of a retroactive application of the new standards.*

Louisiana and Oregon are the only *two* states to even try to get away with this less-than-unanimous-trick on a felony, and neither had the heart to throw it at a man charged with a capital offense ("We gave him every chance.") But for this court to dignify their short-cut justice by a calling the right to a unanimous verdict, a "new" standard is to forget what forty-eight other states have not forgotten.[6]

This court says *that* these two short-cutters undoubtedly *relied* upon their own version of the law because of dicta in *Maxwell v. Dow.* Yet in *Duncan* the court indicates what history knows, that this is "a position long since repudiated" (and the dicta was respectively rejected).

In what case is a "new" standard so unique that it won't effect the administration of justice? And in even attempting to answer or apply the *Stovall* rules the

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[5]A life prisoner, unfortunately, in the same hamper with a man facing a few more days in jail, *Destafano v. Woods, supra.*

[6]Idaho (Const. Art. I, sec. 7) Montana (Art. III, Sec. 23) and Oklahoma (Art. II, sec. 19) allow less than unanimous for misdemeanors (Pet. for a Writ of Cert. at p. 13, fn. 13).

problem is easily discerned: the rules are vague, spacious and bent in any direction with the stroke of the pen.

Carcerano is doing life in Oregon. He appeals. He must have been deprived of his right to EFFECTIVE counsel because the 10-12 jury is not mentioned. Let's say that after Certiorari is denied the first time, he thinks of it; this Constitutional Amendment of 1934 hasn't been challenged since 1936 and that was just in Oregon on *Maxwell v. Dow;* the petitioner files habeas corpus (given renewed strength by this court[7] and more cases fall into Mr. Justice Black's camp with the 14th busy picking up the first 8, even the 6th right to a jury trial; and Carcerano's Writ is lodged before *Duncan* is even set for hearing. Then the decision in this case: the 14th picks up the 6th but this is the wrong remedy. This is hard to comprehend — without legislation, this is impossible to understand when a tally is made of the cases on the one side (prospective) and the cases on the other (retroactive).

Petitioner submits that he should be considered different than those whose appeals have become final pre-*Duncan,* because his point—certainly *not the* point in *Duncan*—was in the Clerk's Office of the court before the oral argument of *Duncan.*

Duncan isn't the first 6/14th right to trial by jury case. (*Cf., Parker v. Gladden* (1966) 87 S. Ct. 468, etc.)

Why isn't the problem more simple than the history, given in *Linkletter v. Walker,* (1965) 381 U.S. 626 (85 S. Ct. 1731)? Isn't the logical question a factor,

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[7] *Fay v. Noia* (1963) (83 S. Ct. 822) 372 U.S. 414.

i.e., how many men are released because of a decision that their constitutional rights have been violated, begs the question.

When a state fails to afford a defendant a jury trial with a unanimous verdict on a felony like all of its neighbors west of the Mississippi, that state knows it's trying to get away with murder.

Make this state give a fair trial to all men convicted without this fundamental right.

The right to transcript on appeal; the right to have an attorney present at a lineup; the right to have the judge hear about the confession outside the presence of the jury; none of these rights seem fundamental.

But, by George, if a prisoner has any piece of paper (form or substance?) over the counter of the court clerk BEFORE the world gets wind of it, then why in the name of Justice and Mercy can't his voice be heard and his prayer granted?

III.
Conclusion.

The *Linkletter-Stovall-DeStefano* rules have to be changed. The rules suspend the Writ of Habeas Corpus, "[t]he great writ of habeas corpus has been for centuries esteemed the best and only sufficient defense of personal freedom." *Ex parte Yerger* (1868) 75 U.S. (8 Wall.) 85, 95.

If this man Carcerano is innocent, it's better that nine guilty inmates at Salem, Oregon are given a new

trial, than that Carcerano perish knowing that this court has said that his petition is only good for the new inmate in the next cell.

Respectfully submitted,

WALTER L. KRONEBERGER,
Attorney for Petitioner.

August 26, 1968, Torrance, California.

WHEREFORE, petitioner prays for his life and respectfully begs this Court to rehear his case so that he will not be forever denied a constitutional right.

FRANK ANTHONY CARCERANO
Petitioner

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

DeSTEFANO *v.* WOODS, SHERIFF OF COOK COUNTY, ILLINOIS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

CARCERANO *v.* GLADDEN, WARDEN.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON.

Nos. 559 and 941. Decided June 17, 1968.

PER CURIAM.

Petitioner Carcerano was convicted of armed robbery and sentenced, on May 11, 1962, to life imprisonment. The Oregon Constitution, Art. I, § 11, permits a jury to convict in noncapital cases if 10 of the 12 jurors support conviction. The Oregon Supreme Court affirmed petitioner's conviction. 238 Ore. 208, 390 P. 2d 923 (1964), cert. denied, 380 U. S. 923 (1965). In 1967, petitioner sought collateral relief under Oregon's post-conviction statute. The sole ground relied upon was that the State and Federal Constitutions were violated when the jury was told it could return a verdict of guilty even though the members did not unanimously favor that verdict. This issue had not been raised by petitioner on his direct appeal. The Oregon Supreme Court denied relief.

Petitioner DeStefano was found in criminal contempt of an Illinois court and sentenced to three concurrent one-year terms.[1] After affirmance by the Illinois Su-

[1] Petitioner DeStefano was ordered released on bail by Mr. Justice Clark pending his direct appeals in the Illinois courts and his first petition for a writ of certiorari. He was again granted release on bail by Mr. Justice Clark pending his appeal to the Court of Appeals from the District Court's denial of habeas corpus

preme Court and denial of certiorari by this Court, 385 U. S. 989 (1966), petitioner unsuccessfully sought state collateral relief and then filed a petition for habeas corpus in the District Court for the Northern District of Illinois. Petitioner's contention was that he was unconstitutionally denied trial by jury. Both the District Court and the Court of Appeals held that the Constitution did not require jury trial for state criminal contempt proceedings.

In *Duncan* v. *Louisiana*, — U. S. — (1968), we held that the States cannot deny a request for jury trial in serious criminal cases, and in *Bloom* v. *Illinois*, — U. S. — (1968), that the right to jury trial extends to trials for serious criminal contempts. *Duncan* left open the question of the continued vitality of the statement in *Maxwell* v. *Dow*, 176 U. S. 581, 586 (1900), that the Sixth Amendment right to jury trial includes a right not to be convicted except by a unanimous verdict. Both *Duncan* and *Bloom* left open the question whether a contempt punished by imprisonment for one year is, by virtue of that sentence, a sufficiently serious matter to require that a request for jury trial be honored. These two issues posed in Nos. 941 and 559 must be considered at this time only if the decisions in *Duncan* and *Bloom* apply retroactively. We hold, however, that *Duncan* v. *Louisiana* and *Bloom* v. *Illinois* should receive only prospective application. Accordingly, the denials of collateral relief to petitioners must be affirmed regardless of whether, for cases to which the rules announced in *Duncan* and *Bloom* apply, the Fourteenth Amendment requires unanimous jury verdicts and affords a right to jury trial for criminal contempts punished by imprisonment for one year.

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relief; this second bail order has continued in force pending consideration of the present petition. Prior to the first bail order, and between the first denial of certiorari and the second bail order, petitioner served a total of 207 days of his concurrent one-year sentences.

In *Stovall* v. *Denno*, 388 U. S. 293, 297 (1967), the Court stated the considerations that affect the judgment whether a case reversing prior doctrines in the area of the criminal law should be applied only prospectively:

> "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."

All three factors favor only prospective application of the rule stated in *Duncan* v. *Louisiana*. *Duncan* held that the States must respect the right to jury trial because in the context of the institutions and practices by which we adopt and apply our criminal laws, the right to jury trial generally tends to prevent arbitrariness and repression. As we stated in *Duncan*, "We would not assert, however, that every criminal trial—or any particular trial—held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury." — U. S., at —. The values implemented by the right to jury trial would not measurably be served by requiring retrial of all persons convicted in the past by procedures not consistent with the Sixth Amendment right to jury trial. Second, States undoubtedly relied in good faith upon the past opinions of this Court to the effect that the Sixth Amendment right to jury trial was not applicable to the States. *E. g., Maxwell* v. *Dow, supra.* Several States denied requests for jury trial in cases where jury trial would have been mandatory had they fallen within the Sixth Amendment right to jury trial was not applicable to the States. See *Duncan* v. *Louisiana, supra,* at —, n. 30. Third, the effect of a holding of general retroactivity on law enforcement and the administration of justice would be significant, because the denial of jury trial has occurred in a very great number of cases in those States not until now accepting the Sixth Amendment guarantee. For example, in Louisiana all those convicted of non-

capital serious crimes could make a Sixth Amendment argument. And, depending on the Court's decisions about unanimous and 12-man juries, all convictions for serious crimes in certain other States would be in jeopardy.

The considerations are somewhat more evenly balanced with regard to the rule announced in *Bloom* v. *Illinois*. One ground for the *Bloom* result was the belief that contempt trials, which often occur before the very judge who was the object of the allegedly contemptuous behavior, would be more fairly tried if a jury determined guilt. Unlike the judge, the jurymen will not have witnessed or suffered the alleged contempt, nor suggested prosecution for it. However, the tradition of nonjury trials for contempts was more firmly established than the view that States could dispense with jury trial in normal criminal prosecutions, and reliance on the cases overturned by *Bloom* v. *Illinois* was therefore more justified. Also, the adverse effects on the administration of justice of invalidating all serious contempt convictions would likely be substantial. Thus, with regard to the *Bloom* decision, we also feel that retroactive application is not warranted.

For these reasons we will not reverse state convictions for failure to grant jury trial where trials began prior to May 20, 1968, the date of this Court's decisions in *Duncan* v. *Louisiana* and *Bloom* v. *Illinois*.[2] The petitions for writs of certiorari are granted and the judgments are affirmed. *It is so ordered.*

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK joins, dissenting.

I am of the view that the deprivation of the right to a trial by jury should be given retroactive effect, as

[2] We see no basis for a distinction between convictions that have become final and cases at various stages of trial and appeal. See *Stovall* v. *Denno*, *supra*, at 300–301.

I thought should have been done with comparable constitutional decisions. See *Gideon* v. *Wainwright*, 372 U. S. 335; *Douglas* v. *California*, 372 U. S. 353; *Linkletter* v. *Walker*, 381 U. S. 618, 640 (dissenting opinion); *Johnson* v. *New Jersey*, 384 U. S. 719, 736 (dissenting opinion); *Stovall* v. *Denno*, 388 U. S. 293, 302 (dissenting opinion).

MR. JUSTICE HARLAN and MR. JUSTICE STEWART would deny certiorari for the reasons stated in MR. JUSTICE HARLAN's dissenting opinions in *Duncan* v. *Louisiana*, — U. S. —, —, and *Bloom* v. *Illinois*, — U. S. —, —.